No. 94-394

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Transphase Systems, Inc.
Petitioner,

v.

Southern California Edison Company and
San Diego Gas & Electric Company
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT SAN DIEGO GAS & ELECTRIC COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "state action" doctrine is applicable to protect private defendants in the context of a civil action brought by a private plaintiff under Sherman Act § 2.

2. Whether the courts below correctly concluded that the State of California has a "clearly articulated and affirmatively expressed" state policy to displace "unfettered business freedom" with regulation in the provision of Demand-Side Management services, sufficient to satisfy the *Midcal* test.

3. Whether the district court correctly declined plaintiff's request to convert defendants' Rule 12(b)(6) motions to dismiss into Rule 56 motions for summary judgment.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

San Diego Gas & Electric Company ("SDG&E") is an investor-owned public corporation. SDG&E has one subsidiary that is not wholly owned: Califia Company. One of SDG&E's wholly owned subsidiaries, Pacific Diversified Capital Company, has one subsidiary that is not wholly owned: Wahlco Environmental Systems, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-17a) is reported at 839 F. Supp. 711.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1994. The petition for rehearing, and suggestion for rehearing *en banc*, was denied on June 9, 1994 (Pet. App. 18a-19a). The petition for writ of certiorari was filed on September 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Transphase Systems, Inc. ("Transphase") filed this action accusing respondents, two electric utilities serving separate regions in southern California, of monopolization and attempted monopolization of the market for Demand-Side Management ("DSM") services related to the use of electricity, and conspiracy to monopolize this same market. Petitioner asserted claims under Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1, 2; and the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 to 16770 (West 1987).

On July 12, 1993, respondents filed separate motions to dismiss petitioner's complaint. The district court granted respondents' motions on three separate grounds. First, the court held that petitioner's complaint was barred in its entirety by the "state action" doctrine, as enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. The district court ruled that California had a clearly articulated and affirmatively expressed state policy to displace competition with respect to DSM bidding and the ratesetting process, and that the California Public Utilities Commission ("CPUC") has actively supervised respondents' DSM activities. (Pet. App. 9a-11a)

Second, the court held that petitioner's antitrust claims were also barred by the *Noerr/Pennington* doctrine.[1/] Specifically, the court ruled that petitioner's claims that respondents appeared together before the CPUC, filed joint briefs before the CPUC, and "resisted meaningful changes" to the CPUC-mandated rebate programs and bidding systems affecting the provision of DSM products, fell squarely within the protection provided by *Noerr/Pennington*. (Pet. App. 12a-13a)

Third, the district court ruled that petitioner's claims were barred because petitioner had failed to allege any facts showing that respondents were significant competitors in the product market alleged to be monopolized. (Pet. App. 13a-16a) The

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[1/] *See United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight*, 365 U.S. 127 (1961).

district court also noted, but did not rule upon, respondent-SDG&E's argument that Transphase had failed to allege any anticompetitive conduct by the utilities or any antitrust injury. (Pet. App. 4a n.1)[2/]

The court of appeals affirmed in an unpublished order, stating that the district court's dismissal of petitioner's complaint for failure to state a cause of action was affirmed for the reasons set out in the district court's opinion relating to the state-action doctrine. (Pet. App. 1a-2a)

B. Statement of the Facts

Both SDG&E and Southern California Edison ("SCE") are utilities that generate, distribute, and sell electric energy. As a result of regulatory policies of the State of California, each utility has a monopoly in the distribution and sale of electricity in its own service territory. Petitioner Transphase conceded in its complaint that respondents' monopoly in this respect is protected under the state-action doctrine as enunciated by this Court in *Parker* v. *Brown* and its progeny. (Compl. ¶ 32) Transphase's complaint instead dealt with DSM, which refers broadly to efforts to reduce system-wide electrical demand. DSM can in theory reduce both the capacity and energy demands of electric consumers, which can in turn reduce the need for utilities to construct new generating plants.

Transphase sells a thermal energy storage ("TES") system, one type of DSM, designed to shift electricity usage from high-demand periods ("peak" periods) when electricity is more expensive, typically at mid-day, to low-demand periods ("off-peak" periods), typically at night. The type of TES system produced by Transphase consists of special water storage tanks and related equipment which allow the customer to operate its electric chiller -- used to cool water for air conditioning -- during the night rather than the day. The chilled water is then

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[2/] At the time the district court dismissed the complaint, Transphase had pending a motion for a preliminary injunction to enjoin two CPUC-mandated Requests for Bid through which respondents were seeking to fill certain of their projected electricity needs. Transphase's motion was mooted by dismissal of its complaint, without any ruling on that motion.

used during the daytime "peak" hours to provide the necessary air conditioning.

By using the Transphase TES system to take advantage of lower "off-peak" electrical rates, commercial electricity customers can lower their electric bills. The problem with Transphase's TES system is that it is too expensive to be commercially attractive; the time over which the cost of the system is recouped in reduced electrical bills is too long to justify the customer's initial expense of installing the system.

In an attempt to remedy such problems, and to promote the use of DSM resources, the CPUC has developed and supervises a program of subsidies, in the form of rebates, for electricity customers that utilize TES or other types of DSM products. Both SDG&E and SCE are authorized to provide such rebates if use of the particular DSM system by a customer meets the criteria set out by the CPUC. The state legislature has also instructed the CPUC to explore the possibility of combining the "bidding" process by which a service area's projected power needs are filled by including both DSM and supply-side management ("SSM") services -- such as new power plants or cogeneration facilities -- in one bidding process.

The main thrust of Transphase's complaint was that the SDG&E and SCE subsidy programs have been insufficiently generous. Transphase alleged that if the respondent utilities had provided more money through the subsidy programs to Transphase's potential customers, it would have sold more of its TES systems. Transphase alleged that the utilities' failure to provide sufficient subsidies to make its systems economically viable constituted a willful maintenance of their monopoly power over "TES retrofit and DSM resources," in violation of Sherman Act § 2. Transphase also claimed that the utilities had "actively resisted" competitive bidding between DSM and SSM options and thus prevented Transphase from competing directly against proposals to build additional generating facilities.

Transphase's Sherman Act § 1 claim, which Transphase abandoned in its appeal to the Ninth Circuit, rested upon allegations that the utilities "conspired" to restrain trade by establishing artificially low rebate levels for TES and establishing measurement standards for themselves different

from those applied to independent DSM providers. Transphase also alleged that the utilities had conspired to appear together before the CPUC to oppose joint bidding of DSM and SSM resources.

REASONS FOR DENYING THE WRIT

The court of appeals' unpublished decision below is correct, entirely in accord with the decisions of this Court, and not in conflict with any decision of another court of appeals. In addition, the district court's ruling rested upon several alternative grounds, any one of which is sufficient to support the judgment. The petitioner's purported distinction between application of the state-action doctrine to Sherman Act § 1 and § 2 claims was not properly raised or ruled upon below, and lacks any legal basis. Petitioner's objections as to whether California has a clearly articulated policy to displace competition in the area of DSM resources is not only without merit, but also presents no legal issue of general importance and represents a straightforward application of well-established law. Petitioner's objection to the district court's refusal to convert respondents' motions to dismiss into motions for summary judgment is similarly meritless and a fact-bound application of well-established legal principles.

I. THE PETITIONER'S PURPORTED DISTINCTION BETWEEN APPLICATION OF THE STATE-ACTION DOCTRINE TO SHERMAN ACT § 1 AND § 2 CLAIMS WAS NOT ADDRESSED BY THE COURTS BELOW AND HAS NO LEGAL BASIS.

A. Neither the District Court Nor the Court of Appeals Addressed Petitioner's Theory.

The district court, after carefully considering the arguments made by all parties in the context of respondents' motions to dismiss, correctly ruled that the state-action doctrine as a matter of law protected respondents from antitrust liability because: (1) California has a clearly articulated and affirmatively expressed policy to displace competition with respect to DSM bidding and the ratemaking process; and (2) the CPUC has actively supervised respondents' DSM activities.

Transphase now argues that the state-action doctrine does not apply to private defendants in the context of a Sherman Act § 2 claim. As an initial matter, this issue was not addressed by either the district court below, or by the Ninth Circuit in its summary affirmance of the district court's dismissal of Transphase's complaint. Transphase in fact did not even raise this issue at the district court level in its opposition to respondents' motions to dismiss, although it did raise a variation of the argument in a footnote in its motion for a preliminary injunction, which was never ruled upon by the district court and mooted by the dismissal of Transphase's complaint.

This Court generally does not consider issues that have not been decided by either of the courts below. *See, e.g., Moor* v. *County of Alameda*, 411 U.S. 693, 696 n.3 (1973); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949). For that reason alone, Transphase's petition for a writ should be denied as to the first question presented by the petition.

B. The Decisions of this Court Do Not Support Petitioner's Theory.

Even if the Court chooses to reach the substantive issue raised by Transphase in its first question, however, it is clear on its face that the distinction Transphase seeks to draw between application of the state-action doctrine to Sherman Act § 1 and § 2 claims is meritless, and has no basis in either the history or purpose of the state-action doctrine.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), the case in which the Court first enunciated the state-action principle, this Court held that state officials could not be held liable under the Sherman Act for implementing a state-mandated agricultural marketing program that restricted competition among growers and maintained prices in the distribution of their commodities to distributors. In so ruling, the Court stated that this so-called "state action" immunity was based upon principles of federalism and state sovereignty. *Parker*, 317 U.S. at 350-51.

Parker v. *Brown* involved a suit against state officials, but the Court subsequently recognized that the foundations of federalism and state sovereignty upon which the state-action doctrine was based required that it also protect anticompetitive actions of a private party that can be attributed to a state's "clearly articulated state policy." *See Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 59-60 (1985). *See also California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (setting out the two prong standard of a "clearly articulated" state policy to displace competition, and "active supervision" of the implementation of that policy). As the Court explained in *Southern Motor Carriers*, if state-action immunity were limited to actions by public officials, the ability of states to regulate their domestic commerce would be frustrated, because any program implemented by a state that restrained competition could be stymied by a suit brought against the regulated parties. *Id.* at 56. *See also Patrick* v. *Burget*, 486 U.S. 94, 100 (1988) ("If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State

could not effectively implement a program restraining competition among them").[3/]

The distinction Transphase seeks to draw between claims under Sherman Act § 1, such as price fixing, and claims under Sherman Act § 2, such as monopolization, has no basis either in the case law of this Court or in the principles underlying the state-action defense. As an initial matter, this Court has *never* distinguished between claims under Sherman Act § 1 and § 2 for purposes of applying the state-action doctrine. Indeed, contrary to Transphase's assertions, this Court has applied the doctrine to private defendants in a case involving alleged violations of Sherman Act § 2. In *Patrick* v. *Burget*, *supra*, the plaintiff-physician alleged claims under both Sherman Act § 1 and Sherman Act § 2. This Court applied the state-action doctrine to all of plaintiff's claims, without differentiating between the § 1 and § 2 claims (although ultimately ruling that defendants were not protected because the "active supervision" prong of the *Midcal* test was not met). *Patrick*, 486 U.S. at 105.

In addition, the principles of federalism and state sovereignty that underlie the state-action doctrine apply with equal force whether a claim is brought under Sherman Act § 1 for a conspiracy in restraint of trade or Sherman Act § 2 for monopolization. Just as a state may mandate a system of price controls that, absent state oversight and approval, amounts to price fixing under Sherman Act § 1, so a state may determine that it is in the interests of its citizens that "unfettered" competition in a given industry or segment of an industry be replaced by a system of regulation that gives rise to a "monopoly" under Sherman Act § 2. In either case, "[i]t is the state which has created the machinery" for establishing the program of regulation, and "the state, acting through the Commission, which adopts the program and enforces it . . . ." *Parker*, 317 U.S. at 352.

[3/] Transphase relies heavily upon language in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), in which the Court voiced some uncertainty as to the applicability of the state-action doctrine to private parties. The Court resolved this uncertainty in *Southern Motor Carriers*.

Indeed, as noted above, Transphase conceded in its complaint that the utilities' state-mandated monopolies in the distribution and sale of electricity in their respective service territories are protected by the state-action doctrine. If Transphase's theory were correct, the utilities would also be open to attack under Sherman Act § 2 for monopolization in the distribution and sale of electricity.

Transphase's argument that applying the state-action doctrine to private defendants in the context of a Sherman Act § 2 claim somehow conflicts with the Supremacy Clause is meritless. Congress does, of course, have the power under the Supremacy Clause to preempt a conflicting state law. But this Court expressly held in *Parker* that Congress did not intend the Sherman Act to preempt the authority of the states to regulate local business activities. *Parker*, 317 U.S. at 350-51 ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.").

Finally, Transphase's claim that *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), stands for the proposition that state-action immunity is only available to state entities in the Sherman Act § 2 context is a serious misreading of that case. In *City of Columbia*, the Court was not faced with a challenge to conduct of private defendants taken pursuant to a state-mandated regulatory regime, as is the case in this action. Rather, the activities that formed the basis of the plaintiff's complaint against the private defendant in *City of Columbia* were its efforts to convince a municipal body to adopt an anticompetitive ordinance. *Id.* at 368. That type of lobbying activity clearly cannot be immunized by the state-action doctrine, because it is not taken pursuant to any type of regulatory mandate from the state. It is, however, petitioning activity that falls under the protection of the *Noerr/Pennington* doctrine, as this Court held. The decision contains no suggestion, however, that the state-action doctrine is not applicable to private conduct in an appropriate case under the *Midcal* standards.

C. There Is No Conflict Between the Circuits on Application of the State-Action Doctrine to Sherman Act § 2 Claims.

The purported conflict between the circuits, and between the Ninth and Third Circuits and the Supreme Court, that Transphase asserts concerning application of the state-action doctrine in the context of a Sherman Act § 2 claim simply does not exist. Neither the district court's ruling in this case, nor the Third Circuit's decision in *Yeager's Fuel, Inc.* v. *Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994), contradict the self-evident principle that regulated utilities do not have a *blanket* immunity from the antitrust laws. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990), *cert denied*, 499 U.S. 931 (1991). Rather, the district court here, and the Third Circuit in *Yeager's Fuel*, found that the specific activities at issue in the cases before them were conducted pursuant to a clearly articulated state policy and were actively supervised by the state. This is a straightforward application of well-settled legal principles.

None of the cases cited by Transphase is to the contrary. In *Town of Concord*, *supra*, the First Circuit held that the activities complained of by the plaintiffs did not amount to a violation of Sherman Act § 2. Having found no violation of the Sherman Act, the court obviously had no occasion to determine whether the utility was protected from liability by the state-action doctrine. In *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), the Eighth Circuit did analyze the activities of the defendant corporation under the state-action doctrine, but found that the state's involvement in the activities complained of was not sufficient to satisfy either prong of the *Midcal* test. *City of Kirkwood*, 671 F.2d at 1180.

In addition, *Town of Concord*, *City of Kirkwood*, and the two early Seventh Circuit cases cited by Transphase,[4/] all involved an alleged "price squeeze" by a utility related to the prices it charged for electricity at the wholesale and retail levels. In all of those cases, only the retail rates were controlled by the state, while the wholesale rates fell under the jurisdiction of the Federal Energy Regulatory Commission. The gravamen of a "price squeeze" case is that a defendant, who operates at two levels of an industry, sets its wholesale price too high and its retail price too low, such that a competitor who operates on only one level of the industry cannot cover its costs and stay in business. It is therefore the relationship between the two prices, not the level at which each price is independently set, that forms the basis of a plaintiff's antitrust claim. Where, as in the cases cited by Transphase, only one of the prices is under the control of the state, the courts found no basis for finding that the *relationship* between the two prices was protected under the state-action doctrine. As was stated by the Seventh Circuit in *Mishawaka I*, the states "in no way placed a badge of approval on the defendant's *dual rate structure*." *Mishawaka I*, 560 F.2d at 1320 (emphasis added).

As a final point, the question of the existence of any current conflict between the Seventh and Ninth Circuits is put to rest by more recent Seventh Circuit cases, such as *Fuchs* v. *Rural Electric Convenience Coop, Inc.*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), in which the court of appeals did apply the state-action doctrine to claims of horizontal market allocation *and* monopolization against a private, investor-owned regulated public utility. *See also Ball Memorial Hospital, Inc.* v. *Mutual Hospital Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) (indicating that state-action immunity would apply, given the appropriate factual predicate, to protect nonprofit providers of health care financing accused of violations of Sherman Act §§ 1 and 2).

[4/] *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (*Mishawaka II*); *City of Mishawaka, Indiana* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) (*Mishawaka I*).

II. THE COURTS BELOW CORRECTLY DETERMINED THAT CALIFORNIA HAS A CLEARLY ARTICULATED STATE POLICY TO DISPLACE COMPETITION.

The district court held that the California legislature has a "clearly articulated and affirmatively expressed" policy to displace competition with respect to DSM bidding and the ratemaking process. This ruling, which was upheld by the court of appeals, was the result of a straightforward application of the well-settled precedent of this Court. *See* Pet. App. 7a, citing *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48 (1985); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Transphase's petition raises no conflict among the circuits as to the standard applied in this case. Transphase argues simply that the district court erred in applying the accepted legal standard to the specific circumstances of California's regulation of DSM activities.

Transphase's argument thus relates only to the application of the clear principles of the *Midcal* test to a specific program under the California regulatory regime. For that reason alone Transphase's argument does not raise an appropriate issue for issuance of a writ. Beyond that, the district court was correct in ruling that the statutory framework passed by the California legislature to govern the regulation of DSM bidding and ratemaking evinced a clear policy to displace competition. Section 747 of the California Public Utilities Code, cited by the district court in its decision, sets out in detail the manner in which the CPUC should regulate the bidding for DSM resources, directing the CPUC to implement "pilot programs" to test the feasibility of combined DSM and SSM bidding, and to report the results of these pilot programs to the legislature. The California Public Utilities Code sets out the criteria by which rebates for DSM are to be determined, and also prohibits the CPUC from changing any rate, or changing the classification, contract practice or rule as a result of the new rate, except upon a showing that the new rate is justified. *See* CPUC §§ 454(a), 701.1(c).

The statutes that Transphase cites in its petition do not, as Transphase asserts, amount to a "clarion call" mandating

complete deregulation of the DSM market. Rather, they are directives to the CPUC instructing it on the manner in which the market for DSM should be regulated. For example, Chapter 984, 1983 Cal. Stat, cited by Transphase, instructs the CPUC "*to regulate* the involvement of electrical and gas corporations in energy conservation development" to ensure that utilities do not dominate the energy conservation business. *Id.* (emphasis added). At most, this provision calls for a particular regulatory focus -- not deregulation.

The first prong of the *Midcal* test is satisfied where the legislature has instructed that a specific field of activity be subject to regulation, with the foreseeable consequence that competition will be suppressed. *City of Columbia*, 499 U.S. at 372-73; *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985). Given the pervasive state regulation of the specific activities of which Transphase complains, and the state's clear intention to displace unfettered competition with a program of supervised control, the district court was correct in ruling that both prongs of the *Midcal* test had been satisfied.

III. THE DISTRICT COURT CORRECTLY DECLINED PETITIONER'S REQUEST TO CONVERT RESPONDENTS' MOTIONS TO DISMISS INTO MOTIONS FOR SUMMARY JUDGMENT.

In the course of finding that the "active supervision" prong of the *Midcal* test was satisfied, the district court took judicial notice of the administrative decisions of the CPUC as demonstrating the extensive regulation of the DSM bidding and ratemaking process. Transphase argues in its petition that the district court's failure to convert the utilities' motions to dismiss into motions for summary judgment was a violation of Federal Rule of Civil Procedure 12(b) and Federal Rule of Evidence 201(b). The district court's ruling on this issue, contained in footnote 5 of its decision, was not addressed in the court of appeals' unpublished affirmance.

Transphase's argument on this issue is by its very nature completely fact-bound. In addition, the district court's use of the CPUC decisions to conclude that the state had exercised

active supervision over DSM bidding and rebates was a straightforward application of both Federal Rule of Evidence 201(b) and Ninth Circuit law. *See Nugget Hydroelectric, L.P.* v. *Pacific Gas & Electric Co.*, 981 F.2d 429, 435 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2336 (1993) (taking judicial notice of CPUC decisions to establish "active supervision" prong of *Midcal*). *See also Brennan* v. *Chestnut*, 973 F.2d 644, 647 (8th Cir. 1992) (taking judicial notice of decision of NLRB administrative law judge); *United States* v. *Camp*, 723 F.2d 741, 744 n.** (9th Cir. 1984) (taking judicial notice of order from California Attorney General).

Transphase cites no case law of this Court or any other that is contrary to the district court's ruling in this case or the Ninth Circuit's ruling in *Nugget Hydroelectric*, *supra*. Transphase's attempt to assert a conflict between the Ninth and Third Circuits, based upon the *Yeager's Fuel* court's conversion of defendant's 12(b)(6) motion to dismiss to a motion for summary judgment because the defendant attached "various [unidentified] documents" to its motion,[5] falls considerably short of the mark. In short, Transphase presents no compelling reason for this Court to grant a writ on this fact-bound evidentiary ruling by the district court.

IV. THE DISTRICT COURT'S DECISION RESTED UPON TWO ALTERNATIVE GROUNDS WHICH WERE SUFFICIENT TO SUPPORT THE JUDGMENT.

In addition to dismissing Transphase's complaint on the basis of the state-action doctrine, the district court also found that Transphase's claims under the Sherman Act were barred under two alternative grounds. First, the court held that the actions taken by the utilities that formed the basis of Transphase's complaint were protected under the *Noerr/Pennington* doctrine. Specifically, the district court held that both Transphase's allegations under Sherman Act § 1, that the utilities had appeared together before the CPUC and "acted

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[5] *Yeager's Fuel*, 22 F.3d at 1272.

in unison" before that body, and its allegations under Sherman Act § 2, that the utilities had "resisted meaningful changes" in DSM regulation through their positions before the CPUC, fell squarely under the protection provided by *Noerr/Pennington* against liability for petitioning the government. (Pet. App. 12a-13a)

The district court also found that Transphase's antitrust claims were defective because Transphase had failed to allege a relevant market in which both Transphase and the utilities were competitors. Transphase characterized the relevant market as "DSM resources," with an apparent submarket of "retrofit thermal energy storage (TES) goods and services." (Pet. App. 14a) However, as the district court noted, Transphase also stated in its complaint that the utilities "are not themselves capable of supplying [these] goods and services. . . ." (Pet. App. 15a) Given Transphase's admission that the utilities had no substantial presence in the relevant market, the court held that as a matter of law the utilities could not be found liable for monopolization, attempted monopolization, or conspiracy to monopolize that market. (Pet. App. 16a) *See Spectrum Sports, Inc.* v. *McQuillan*, 113 S. Ct. 884 (1993).[6/]

This Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Thus, these alternative grounds for the district court's judgment eliminate any conceivable need for granting of the writ.

[6/] Respondent SDG&E raised in the lower courts yet an additional ground for dismissal of the complaint: Transphase's failure to allege any anticompetitive conduct by respondents and/or antitrust injury to itself. The central claim in Transphase's complaint was that the utilities failed to pay sufficient subsidies to make DSM products viable to customers. While the payment of insufficient subsidies might conceivably be a breach of the utilities' obligations under a state regulatory program, it does not state a claim of anticompetitive conduct under the Sherman Act.

CONCLUSION

Respondent SDG&E respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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